FAR EAST FOOD INDUSTRIES SDN BHD

v.

PT ANEKAPANGAN DWITAMA

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
[APPLICATION NO: W-08-161 OF 1995]
27 SEPTEMBER 1995

CONSTITUTIONAL LAW: *Judges - Judicial functions - Direction by judge to counsel to prepare draft judgment - Whether proper and acceptable - Delegation of judicial functions by judge to counsel - Whether permissible - Exercise of independent judgment and discretion, importance of*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Bias - Direction by judge to counsel to prepare draft judgment - Whether proper and acceptable - Whether justice done and seen to be done - Impropriety*

CIVIL PROCEDURE: *Judgments and orders - Direction - Direction by judge to counsel to prepare draft judgment - Whether proper and acceptable*

The respondent had earlier commenced winding-up proceedings against the applicant pursuant to s. 218 of the Companies Act 1965. Pending the final disposal of the winding-up petition, the respondent made an application for the appointment of a provisional liquidator to manage the affairs of the applicant. The learned judge allowed the respondent's application and ordered the appointment of a provisional liquidator ('the said order'). Thereafter, the learned judge directed counsel for the respondent to prepare a draft judgment in respect of the said order ('the said direction'). Counsel for the respondent complied with the said direction and, subsequently, a copy of the draft judgment was extended to counsel for the applicant by the secretary of the learned judge. Thereafter, the learned judge issued a written judgment which was, substantially, a reproduction of the draft judgment prepared by counsel for the respondent.

It was in these circumstances that the applicant filed the instant motion for, *inter alia*: (i) extension of time to file the instant motion out of time; and (ii) leave to appeal against the said direction.

Held:
Per Siti Norma Yaakob JCA

[1] The instant motion was not concerned with the substance of the said order but with the propriety of the said direction.

[2] The instant motion should not be barred by the delay on the part of the applicant in filing it. Once the conduct of any member of the judiciary is challenged, it becomes a grave matter of public concern; such a challenge draws public interest and it is, therefore, incumbent upon the court to examine the propriety of the conduct complained of.

[3] The judicial act of requesting counsel of a successful party to tender a draft judgment which is later adopted by the judge as his judgment is highly **improper** and, therefore, **unacceptable**.

[3a] In the performance of his judicial functions, a judge does a balancing exercise when he decides and resolves disputes between opposing parties and interests. Thus – hearing a case, making a decision on the case, and supporting the decision with reasoned arguments and findings by way of an oral or written judgment – are part and parcel of a judge's judicial functions. The most important characteristic of his judicial functions is the exercise of independent judgment and discretion. It is for this very reason that a judge **cannot** under any circumstances delegate any of his judicial functions to any person for whatever reason. In the exercise of his judicial functions, a judge is expected to do justice to the parties appearing before him; he cannot do so if he appears to be partial to any party. Justice must not only be done but must be seen to be done.

[Extension of time to file the instant motion out of time and leave to file an appeal against the said direction granted; appeal allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PERLEMBAGAAN: *Hakim - Fungsi kehakiman - Arahan oleh hakim kepada peguam supaya menyediakan deraf penghakiman - Samada menurut aturan dan boleh diterima - Perwakilan fungsi-fungsi kehakiman oleh hakim kepada peguam - Samada boleh dibenarkan - Pentingnya perlaksanaan penghakiman dan budibicara bebas*

UNDANG-UNDANG PENTADBIRAN: *Perlaksanaan fungsi-fungsi kehakiman - Berat sebelah - Arahan oleh hakim kepada peguam untuk menyediakan deraf penghakiman - Samada menurut aturan dan boleh diterima - Samada keadilan terlaksana dan kelihatan sebagai telah dilaksanakan - Ketidakwajaran*

PROSEDUR SIVIL: *Penghakiman dan Perintah - Arahan - Arahan oleh hakim kepada peguam untuk menyediakan deraf penghakiman - Samada menurut aturan dan boleh diterima*

Responden telah pada awalnya memulakan prosiding penggulungan terhadap pemohon selaras dengan s. 218 Akta Syarikat 1965. Sementara menantikan pelupusan muktamad petisyen penggulungan, responden telah membuat satu permohonan untuk perlantikan penyelesai sementara bagi mengendalikan hal ehwal pemohon. Hakim yang bijaksana telah membenarkan permohonan responden dan memerintahkan perlantikan penyelesai sementara ('perintah tersebut'). Kemudiannya, hakim yang bijaksana telah mengarahkan peguam bagi pihak responden untuk menyediakan satu deraf penghakiman berhubung dengan perintah tersebut ('arahan tersebut'). Peguam bagi pihak responden telah mematuhi arahan tersebut dan, berikutan itu, sesalinan deraf penghakiman telah dikemukakan kepada peguam bagi pihak pemohon oleh setiausaha hakim yang bijaksana. Kemudiannya, hakim yang bijaksana telah mengeluarkan penghakiman bertulis yang mana adalah, secara substansialnya, satu penghasilan semula deraf penghakiman yang disediakan oleh peguam bagi pihak responden.

Dalam keadaan ini pemohon telah memfailkan usul semasa ini untuk mendapatkan, antara lainnya: (i) perlanjutan masa untuk memfailkan usul semasa ini diluar masa; dan (ii) kebenaran untuk merayu terhadap arahan tersebut.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Usul semasa ini tidak berkaitan dengan substans perintah tersebut tetapi berkaitan dengan kewajaran arahan tersebut.

[2] Usul semasa ini tidak seharusnya dihalang oleh kelewatan di pihak pemohon dalam memfailkannya. Sebaik sahaja perlakuan mana-mana ahli kehakiman dicabar, ianya menjadi perkara penting yang diambil berat oleh orang awam; cabaran yang sedemikian menarik minat orang awam dan ianya dengan itu, terletak pada mahkamah untuk memeriksa kewajaran perlakuan yang diadukan itu.

[3] Tindakan kehakiman meminta peguam pihak yang berjaya untuk mengemukakan deraf perjanjian yang mana kemudiannya diterima pakai oleh Hakim sebagai penghakimannya adalah amat **tidak wajar** dan, dengan itu, **tidak dapat diterima.**

[3a] Dalam melaksanakan fungsi kehakimannya, seseorang hakim melaksana pengimbangan apabila beliau memutuskan dan menyelesaikan pertikaian antara pihak-pihak yang bertentangan dan kepentingan yang terlibat.

Dengan itu – mendengar sesuatu kes, membuat keputusan ke atas kes itu, dan menyokong keputusan itu dengan hujahan-hujahan yang mempunyai alasan dan keputusan melalui penghakiman lisan atau bertulis adalah merupakan sebahagian daripada fungsi kehakiman seseorang hakim. Ciri-ciri yang paling penting mengenai fungsi kehakimannya ialah perlaksanaan penghakiman dan budibicara bebas. Adalah atas alasan ini semata-mata bahawa seseorang hakim tidak boleh di bawah sebarang keadaan mewakilkan mana-mana daripada fungsi kehakimannya kepada sesiapa atas apa-apa alasan sekalipun. Dalam melaksanakan fungsi kehakimannya, seseorang hakim dijangkakan melakukan keadilan kepada pihak-pihak yang berada di hadapan beliau; beliau tidak akan dapat melakukannya jika ianya bersikap berat sebelah kepada mana-mana pihak. Keadilan bukan sahaja harus dilakukan tetapi mestilah kelihatan seperti telah dilakukan.

[Perlanjutan masa untuk memfailkan usul semasa ini di luar masa dan kebenaran untuk memfailkan satu rayuan terhadap arahan tersebut diberikan; rayuan dibenarkan.]

Legislation referred to:
Companies Act 1965, s. 218

[Appeal from High Court Malaya, Kuala Lumpur; Companies Winding-up No: D2-28-357-1993]

[Editor's note: This judgment was received on 13 August 1997.]

For the appellant - RR Sethu (R Rajasingam with him); M/s RR Sethu
For the respondent - Matthias Chang; M/s Suhaimi, Khor, Zulkifli & Chang

JUDGMENT

Siti Norma Yaakob JCA:

In this motion the applicant, (the respondent in the court below) seeks four principal reliefs:

(1) Extension of time to file this motion out of time.

(2) Leave to appeal against the direction of Richard Talalla J, directing the respondent's solicitor to produce a draft judgment.

(3) The filing of the formal record of appeal be dispensed with.

(4) The motion be heard and disposed of as a substantive appeal.

Proceedings against the applicant were initiated by the respondent before Richard Talalla J by way of a winding up petition pursuant to s. 218 of the Companies Act 1965, on the ground that the applicant is unable to pay its debts.

Subsequently two applications came before the learned judge on 23 June 1994, one by the respondent to have a Provisional Liquidator appointed to manage the affairs of the applicant pending the disposal of the winding up petition and the other by the applicant to have the petition struck out.

The parties agreed to have the respondent's application heard first and the other application by the applicant adjourned pending the outcome of another related action.

The learned judge allowed the respondent's application and ordered the appointment of a Provisional Liquidator to manage the affairs of the applicant pending the outcome of the petition. Dissatisfied, the applicant appealed to the then Supreme Court and the appeal is registered as Supreme Court Civil Appeal No: 02-350-94 and this appeal is still pending.

It was following the lodgment of the appeal that the learned judge directed Miss L.Y. Oon, counsel who appeared successfully for the respondent in the application for the appointment of a Provisional Liquidator, to prepare a draft judgment on the order he had granted on 23 June 1994, for his consideration. It is in connection with this direction that the present proceedings are concerned.

Miss L.Y. Oon duly complied with the learned judge's direction and on 5 August 1994, the judge's secretary enclosed a copy of the draft judgment prepared by Miss L.Y. Oon to Mr. Rajasingam, Counsel for the applicant, with a request to comment on it. That was the first occasion that Mr. Rajasingam became aware of the learned judge's direction and he did not waste much time to express his horror at the impropriety of the course adopted by the learned judge and by letter dated 6 August 1994, he clearly intimated that fact to the judge's secretary and declined to comment on the draft judgment. He also indicated that he was duty bound to seek his client's instructions on the matter.

Three days later on 9 August 1994, Mr. Rajasingam was reminded by the judge's secretary that if he, Mr. Rajasingam did not respond to the draft judgment within the next seven days or such further reasonable period, the learned judge would proceed to write his judgment which would also include a reference to the course he had taken.

Needless to say Mr. Rajasingam offered no comments to the draft judgment and on 22 September 1994, the learned judge issued his written judgment

which in substance is a reproduction of the draft judgment prepared earlier by Miss L.Y. Oon. Attached to this written judgment was another judgment (the supplementary judgment) issued by the learned judge giving reasons for the course he had taken in directing Miss L.Y. Oon as he did.

It is to protest against the impropriety of the directive given by the learned judge to Miss L.Y. Oon that the present motion was filed. At the outset of the hearing Mr. Matthias Chang, Counsel for the respondent raised a preliminary objection that the present proceedings are misconceived as there is already an appeal pending in the now Federal Court and whatever mischief the judgment of the learned judge had done, has already been cured by the Federal Court when it ordered the removal of the written judgment from the records of appeal.

That written judgment may well have been removed from the records but what we are concerned with in this motion is not the substantive order made by the learned judge providing for the appointment of the Provisional Liquidator, for which the appeal is still pending in the Federal Court, but the directive given to Miss L.Y. Oon to produce a draft judgment. It must also be remembered that the order appointing the Provisional Liquidator was made on 23 June 1994 but the directive was given after 23 June 1994. What is before the Federal Court is a separate matter altogether and it has nothing to do with the propriety or impropriety of the judge's directive that is now being questioned. That can only be challenged before us following the establishment of the court of Appeal on 24 June 1994 and on that finding we had overruled Mr. Chang's preliminary objection.

As this motion was only filed on 11 April 1995, eight months after the learned judge gave his directive and issued his written judgment on 22 September 1994, it is incumbent upon Mr. Sethu, Counsel for the applicant to explain the delay in filing the present proceedings. Mr. R. Rajasingam, the applicant's instructing Counsel in his affidavit in support of the motion, has explained that initially the applicant was reluctant to pursue the matter but only agreed to do so when it was explained that the propriety or impropriety of the directive concerns a matter of public interest.

Placed in the position of the applicant, we fully appreciate its reluctance to formally and publicly question the action of a senior member of the judiciary. However, considering the very nature of the complaint and that the judgment has been published in a number of law journals, we are of the opinion that delay should not bar the applicant's complaint from being reviewed as once the conduct of any member of the judiciary is challenged it becomes a grave matter of public concern as such a challenge invites public interest and it is therefore incumbent upon us, the forum to which the complaint has been

lodged to consider the correctness or otherwise of the conduct complained of. It was based on these considerations that we:

(1) granted an extension of time to the applicant to file this motion out of time;

(2) granted leave to the applicant to file an appeal against the directive of the learned judge directing Miss L.Y. Oon to prepare the draft judgment;

(3) dispensed with the filing of a formal record of appeal as whatever papers that needed to be filed are already before us; and

(4) treated this motion as a substantive appeal.

Coming now to the merits of the appeal, Mr. Matthias Chang, Counsel for the respondent elected not to address the court after he unsuccessfully applied to have the appeal adjourned. We had subsequently allowed the appeal and we now give our reasons for having decided so.

The only issue raised in this appeal is whether the act complained of ie, requesting Counsel of a successful party to tender a draft judgment which was later adopted by the learned judge as his judgment, is right and proper and can be accepted or condoned. I need to stress here that what is under scrutiny is the nature and character of the judicial act itself rather than the character of the person performing it.

In his supplementary judgment, the learned judge justifies his action in the following manner:

> The invitation to counsel for the applicant to prepare a draft judgment was made in order to expedite the final resolution of the dispute between the parties. The invitation was made openly through the normal channel of the judge's staff. There was nothing surreptitious about it.
>
> The invitation was made on the following premises: firstly, the unquestioned integrity and good faith of the court and both counsel; secondly, that counsels' primary duty is to the court and not to the litigant counsel represents and as such counsel is amicus curiae, as per Lord Reid in *Rondel v. Worsley* [1969] 1 AC 191; thirdly, the matter was decided on affidavit evidence and questions of credibility and demeanour of witnesses did not arise and accordingly the appellate court will be in just as good a position to decide this matter as I was able to, the appellate court being in no way fettered by my decision; fourthly, the opportunity to be heard in regard to the draft judgment was always intended to be provided and this was eventually done; and fifthly, the order had been made, it was a fait accompli, and the judge was *functus officio* except only to give grounds for his decision.

With respect we cannot accept his reasoning as he was approaching the issue on the premise that the applicant, now the appellant, was not prejudiced by the draft judgment prepared by the respondent's counsel. This is clear when he posed and answered the following question, when considering the cause of action he had taken.

> A pertinent question to ask is what prejudice has the respondent (ie, the appellant before us) "suffered as a result of the draft judgment prepared by counsel for the applicant" (ie, the respondent before us). As far as I can see, none.

We consider this approach to be highly erroneous as what is being questioned is not the effect of what the draft judgment has on the appellant but the conduct, *per se,* of the learned judge himself in invititing (as was the term used by the learned judge) the respondent's counsel to prepare a draft judgment which he later adopted as his own. Is such conduct acceptable?

We emphatically say "no" for the following reasons.

In the exercise of his judicial functions, a judge does a balancing exercise when deciding and resolving disputes between opposing parties or interests. Thus hearing a case, making a decision on the case and supporting much a decision with reasoned arguments and findings by way of an oral or written judgment form part and parcel of a judge's judicial acts or functions. The most important characteristic of his judicial functions is the exercise of independent judgment and discretion. It is for this very reason that a judge cannot under any circumstance delegate any of his judicial functions to anybody for whatever reason whatsoever. In the exercise of his judicial functions a judge is expected to do justice to the parties appearing before him. He cannot do so if he appears to be partial to any party as justice must not only be done but must be seen to have been done.

In this case, the request to prepare the draft judgment was made to the respondent's counsel, the party who had successfully obtained the order, on which the judgment is based, without the knowledge of the counsel for the appellant. The reason why the counsel for the appellant was not approached is stated by the learned judge to be as follows:

> Counsel for the applicant was invited to prepare the draft judgment rather than counsel for the respondent because the submission of the former when appearing before me was far more comprehensive on the facts and the law than that of the latter.

The draft judgment runs into 16 pages and the learned judge has adopted relevant parts of the draft judgment as his judgment dated 22 September 1994.

A perusal of the draft judgment shows that it contains more than the mere marshalling of facts and law. It contains the findings of the court as expressed by counsel of the successful party. We are mindful that the learned judge had already made an order on which the draft judgment is based but we do not know what considerations and findings the learned judge had placed on the submissions made by Counsels for the parties, other than that expressed in the draft judgment for which the learned judge is not the author.

It is to protect the impartiality and integrity of the court below that we had intervened and ruled that the learned judge's conduct in inviting counsel for the respondent to prepare the draft judgment which the learned judge subsequently adopted as his own, to be highly improper and that there is no justification for such a request to have been made in the first place. On that finding, we had allowed this appeal but made no order as to costs.

Abu Mansor Ali JCA:

I have had the benefit of reading the judgment in draft of Dato' Siti Norma Yaakob JCA with which I agree. I associate myself, with respect, with it and agree that the appeal be allowed with no order as to costs.

Reported by Gan Peng Chiang